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No. 418.

IN THE

Supreme Court of the United States

October Term, 1966.

IN THE MATTER OF THE ESTATE OF
VAN B. HOOPER, Deceased,
Petitioner,

v.

THE GOVERNMENT OF THE VIRGIN ISLANDS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion and judgment of the District Court of the Virgin Islands (Pet. App. A) are unreported. The opinion of the court of appeals (Pet. App. B) is reported at 359 F. 2d 569.

JURISDICTION.

The judgment of the court of appeals was entered on April 22, 1966, and a timely petition for rehearing was denied on May 12, 1966. The petition for a Writ of Certiorari was filed on August 5, 1966. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Whether the Industrial Incentive Program of the Municipality of St. Croix, as embodied in Municipal Council Bills numbers 35 and 39, authorized the Tax Exemption Board to recommend and the Governor of the Virgin Islands to grant industrial subsidies to an individual who rendered personal professional service to a corporation located and operated outside of the Virgin Islands.

STATUTES INVOLVED.

Municipal Council Bill No. 35, Seventh Council—First Session, 1949, of the Municipality of St. Croix, Virgin Islands, and Municipal Council Bill No. 39, Eighth Council—First Session, 1951, of the Municipality of St. Croix, Virgin Islands, are respectively set forth in Appendices C and D to the petition.

STATEMENT.

Respondent does not accept the statement of Petitioner, set forth in its petition, pp. 2 to 5, inclusive. Respondent adopts as its statement of the facts material to the considerations of the questions here presented, the summary of the evidence contained in the opinion of the Court of Appeals.[1]

ARGUMENT.

1. The court of appeals correctly applied the ordinances involved in this case. Finding that "Hooper [merely] transferred his office equipment, library and photographic material from his office in Wisconsin to his office, and later to his home, in St. Croix, and thereafter performed in St. Croix services for his Company identical with some of the services which he had previously rendered to it in Wisconsin" (Pet.

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[1] See Pet. App. B, pp. A-7 through A-12, and 359 F. 2d 569, 571-574.

App. A-16),, the court properly concluded as follows: (1) that the Tax Exemption Board and the Governor of the Virgin Islands, the former in recommending and the latter in granting tax exemptions and industrial subsidies to the decedent had exceeded their lawful authority and hence had acted arbitrarily; (2) that the Board as constituted on December 29, 1961, acted arbitrarily also in finding continuing qualification and compliance by Van Hooper under the industrial incentive program; and (3) that the Tax Exemption Board and the Governor had exceeded their powers under the pertinent ordinance in making the subsidy grant to Van Hooper. These conclusions are fully in accord with both the letter and the spirit of the applicable ordinances.

The Ordinances in question were enacted to effectuate the industrial incentive program of the Municipality of St. Croix. The language of the Bills made clear that the enterprises or businesses sought to be favored were those which were engaged in industry as that term is generally understood. Contemplated was a capital investment which would give new life to the economic development of the Municipality and which would endure as a "self sustaining" enterprise, utilizing the "natural resources" of the island, making the "economic life" of the community "as diverse and stable as possible". The reward held out upon qualification was an "industrial subsidy", a phrase which pervades Section 3 of Bill Nos. 35 and 39. It is specifically the "industrial subsidy" spelled out in that section, and allowed over a period of eight years (later extended to ten years) which the Board and Governor granted to Van Hooper and to which the Court below found the said decedent to be not entitled.[2]

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[2] The precise language of Section 3, Bill No. 39 is printed in App. A, pp. A-33 to A-34.

Moreover the program contemplated an industry or business located in St. Croix. Even the most cursory examination of the facts of this case compels the conclusion that Van Hooper failed to meet this requirement, as the Court below found. It is therefore, the petitioner who advocates an interpretation contrary to the language, purpose and contemplation of the Ordinances.

2. There can be no serious question as to the authority of the court of appeals to review the action of the Board and to overrule its decision where, as here, that decision is found to have been beyond the Board's lawful authority. Authority to reverse arbitrary action, such as was found here, is expressly conferred in both of the ordinances in question:

> Decisions of the Board as to questions of fact shall be deemed final in any proceedings of any court except in such cases as it shall be conclusively shown that any such decision was arrived at by arbitrary or fraudulent means.[2]

Moreover, administrative boards are strictly limited to powers expressly granted, or such as are necessary by fair implication. 42 Am. Jur., Public Administrative Law, Sec. 26, p. 316. *Laymen v. State Unemployment Compensation Commission, et al.*, 167 Ore. 379, 117 P. 2d 974. Certainly it was an excessive exercise of authority by the Board to grant industrial subsidy and tax exemption to a concern not covered by the Ordinance. The Court below was amply justified in so finding. If then, as the Court found, the Board and Governor were without jurisdiction to act as they did, the consequences to decedent or to his estate of such a ruling is not a permissible consideration. Were this not so,

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[2] The precise language of Section 3, Bill No. 39 is printed in App. A, pp. A-33 to A-34.

any contract between an agent or agency of government could go unchallenged, notwithstanding the agent's or agency's lack of authority to enter into the contract in question. True, the Ordinances declared grants of tax exemption and industrial subsidies to be in the nature of contracts, but this provision must be read to envisage a legally valid contract.

3. Contrary to petitioner, the decision below, finding arbitrary action by both Board and Governor, is consistent with the previous rulings of the court of appeals. *King Christian Enterprises v. Government of the Virgin Islands,* 345 F. 2d 633 (3rd Cir., 1965), is the case relied on by Petitioner in support of its allegation of inconsistency. The fact is that in that case the Court mentioned with approval each of the salient points of its holding in the instant case. The Court there said,

> It is quite clear that the Legislature intended to confer upon the Governor, and the Board as his advisor, wide discretionary power to carry out the legislative intent to benefit the economy of the Territory by extending the benefits of the tax exemption and subsidy program to appropriate individuals and corporations. This intent is highlighted by the provisions of Section 9(b) of the Act of 1957, V. I. Sess. L. 1957, p. 154, 33 V. I. C. (1958 Supp.) §4109(b), that decisions of the Board as to questions of fact shall be final and not judicially reviewable except when arbitrary or fraudulent action is conclusively shown. And it is expressly indicated by Section 4041 of 33 V. I. C., which was enacted by the Act of November 3, 1961, No. 798, V. I. Sess. L. 1961, p. 253, and which was in force when the Governor acted in this case. For that section limits the benefits of the program to those whose 'industrial

> or business activity, in the judgment of the Governor of the Virgin Islands will promote the public interest by economic development of the Virgin Islands, and which requires for its establishment or expansion the granting of the tax exemption and subsidy benefits provided for' by the Act . . .[3]

And again,

> But all this is not to say that the court was without power to review the action of the Board and the Governor in order to determine whether any error of law infected their proceedings or decision and to set aside the Governor's decision if such error was found and remand the case for further proceedings in accordance with the applicable rules of law properly applied. §§1421 et seq. of title 5 V. I. C. give the court this power . . .[4]

Furthermore, the assertion of Petitioner that the decision below upsets an interpretation of long standing is without basis in fact. The instant case, with respect to its particular issues is one of first impression.

Nor is there any conflict between the decision below and that in *Everlasting Development Corporation, et al. v. Sol Luis Descartes, et al.*, 192 F. 2d 1 (1st Cir., 1951). The comparison is most inapt for in that case the Court did not construe the Puerto Rican Industrial Incentive Act. Rather, the Court affirmed a judgment dismissing the complaint, on the narrow holding that on the facts of that case the factual allegation did not set forth a substantial federal claim within the jurisdiction of the District Court of Puerto Rico. It is noteworthy that the Court pointed out that the construction of an insular tax exemption statute is not a federal ques-

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[3] At page 636.

[4] At page 637.

tion.[5] And, in any event, there is a basic difference between the Puerto Rican Act and the St. Croix Bills. The latter, as we have observed, made decisions of the Board reviewable in Court proceedings, albeit limited, the former made finding of its Executive Council final, with no administrative or judicial proceeding possible.[6]

4. The present case, though possibly of local interest in the Virgin Islands, presents no federal question of general importance. Petitioner's contention that the decision below imperils the entire Virgin Islands Tax Exemption Program is patent hyperbole. The question whether an applicant qualifies for tax exemption and industrial subsidies must necessarily be investigated and determined on a case by case basis. A diligent search has failed to disclose a single instance, other than the instant case, in which an applicant engaged in rendering personal or professional service was granted tax exemption and industrial subsidies under the Ordinances in question. Indeed, petitioner properly recognizes that the Board gave Van Hooper "special consideration" (Pet. 9).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ALMERIC L. CHRISTIAN,
Special Counsel to Government of the Virgin Islands.

September 1966.

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[5] At page 6. The jurisdiction of the District Court of the Virgin Islands in the instant case was based on Section 22, Revised Organic Act of the Virgin Islands, 68 Stat. 506 (1954), 49 U. S. C. Sec. 1612.

[6] Act. No. 184, approved May 13, 1948, Section 16, Laws of Puerto Rico (1948) p. 482.